BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD A. BAKER	)	
Claimant	)	
VS.	)	
	)	
MIDWEST GRAIN PRODUCTS	)	
Respondent	)	Docket Nos. 233,888;
	)	265,229
AND	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 9, 2002, Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on January 7, 2003. Gary M. Peterson was appointed and participated in the determination of this appeal as a Board Member Pro Tem.

APPEARANCES

Gary L. Jordan of Ottawa, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that the transcript of the May 31, 2002 deposition of David Rindom is a part of the record and should be considered by the Board.

ISSUES

This appeal involves two separate docketed claims which were consolidated for hearing and award purposes. Docket No. 233,888 involves a January 2, 1998, accident and back injury. In an Agreed Award entered May 17, 1999, claimant was awarded a 9.5 percent permanent partial general disability. Claimant is now seeking review and modification of that award alleging an aggravation of his back injury. Claimant contends his back injury has been aggravated by his altered gait and from performing his work, particularly lifting, with a stiff knee and weakened leg. The altered gait, stiffness and weakness were caused by a June 9, 2000, right knee injury which is the subject of Docket No. 265,229. Claimant is also claiming a general body disability in Docket No. 265,229, in addition to the right knee impairment, for the injury to his back resulting from the knee injury. Accordingly, one of the issues presented to the ALJ and for determination by the Board in this review, is whether claimant's alleged worsened back condition is compensable under either Docket No. 233, 888 or Docket No. 265,229.

In Docket No. 265,229 the ALJ awarded claimant permanent partial disability compensation for a ten percent scheduled injury to the leg. But the ALJ determined claimant failed to prove "that he suffered any back injury as a result of his knee injury, and even if there was such evidence, he has completely failed to show what any functional impairment would be." [1] As a result, the ALJ denied permanent partial disability compensation for the alleged aggravation of claimant's pre-existing back injury in both docketed claims.

Claimant lists the issues to be decided as:

1. The extent of the impairment sustained to Mr. Baker's right leg;

2. The extent of the additional impairment Mr. Baker has suffered in his back;

3. The combined impairment rating to the body as a whole;

4. Whether the additional back impairment is the normal progression of his prior back injuries and surgeries, or whether it was a natural consequence of the knee injury;

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[1] Award at 4 and 5.

5. Whether Mr. Baker's present physical restrictions, prevent him from returning to work at his regular job as a maintenance man for the respondent;

6. Whether the respondent offered accommodated employment to Mr. Baker at a comparable wage as defined by K.S.A. 44-510e, which he refused to accept; and

7. If Mr. Baker is entitled to work disability, the percentages of wage loss and task loss which he has incurred. [2]

In addition, claimant argues that Dr. John R. Eplee's bills and the mileage and travel expense to Dr. Eplee's office should be ordered paid as authorized medical.

Conversely, except as to the award of temporary total disability compensation for the period of September 14, 2000 through September 17, 2000, respondent contends that the ALJ's Award should be affirmed.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

At the time of the regular hearing, claimant was 43 years old. He went to work for respondent right after high school and stayed with them for 24 years. Respondent operates a grain processing and alcohol fermentation plant in Atchison, Kansas. Claimant's job in the maintenance department primarily involved the upkeep of machinery. Claimant described three prior work-related back injuries. Two in 1979 and one in 1993. Dr. Roger Hood performed a two-level back surgery in 1993 at L4-5 and L5-S1 after which claimant returned to full duty without restrictions. Following his 1998 injury, which is the subject of Docket No. 233,888, claimant underwent another surgery at L4-5 by Dr. David J. Clymer. He was again returned to full duty without restrictions. [3] Claimant was able to perform his regular job duties until June 9, 2000 when he slipped in oil and fell, twisting his right knee.

Claimant was sent to Dr. Gregory Henry. On June 12, 2000, Dr. Henry removed fluid from the knee and fit claimant for a knee brace. He placed claimant on restricted duty for one week and, effective June 16, returned him to regular duty. Claimant testified that after his knee injury his right knee was stiff and he was unable to squat and lift with his legs. As a result, he began using his back more to bend over and do the lifting. Because

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[2] Claimant's Brief to Workers' Compensation Appeals Board at 4 (filed Aug. 20, 2002).

[3] It was Dr. Clymer's understanding when he released claimant to full duty on January 5, 1999, that claimant's job did not require lifting over 50 pounds. Clymer Depo. at 37.

of his altered body mechanics, his back became extremely sore. Eventually, Dr. Henry referred him to an orthopedic surgeon, C. Daniel Smith, M.D.

Dr. Smith performed right knee surgery on September 7, 2000. Afterwards, claimant was off work until Dr. Smith released him on September 15, 2000 to full duty. In performing his job duties, claimant experienced increased stress on his back due to the lack of flexibility and strength in his knee. When claimant reported his back symptoms to Mr. Rindom, Mr. Rindom asked claimant if he injured his back at the same time as his knee. Claimant said he replied, "no, not immediately" and, therefore, Mr. Rindom recommended claimant see his family physician for his back. [4] Claimant went to Dr. Eplee and was taken off work. Claimant applied for and received disability payments from respondent. This disability was separate from workers compensation. Based on the testimony of Debbie Robinson and David Rindom, the Board finds that claimant was not sent nor referred to Dr. Eplee for a work-related injury. Claimant chose Dr. Eplee himself and saw him in connection with obtaining disability payments separate from workers compensation. Accordingly, the ALJ was correct in denying claimant's request that respondent be ordered to pay as authorized medical Dr. Eplee's bills and claimant's mileage expense traveling to see Dr. Eplee.

Eventually, claimant returned to Dr. Clymer, who claimant said recommended fusion surgery which claimant declined. Dr. Clymer released claimant to return to work with restrictions to avoid lifting over 50 pounds and repetitive bending and squatting. When claimant returned to work on May 17, 2001, there was some confusion concerning Dr. Clymer's restrictions and, as a result, claimant did not perform any job duties on that date.

Thereafter, there were several conversations between claimant and respondent's human resources department concerning what jobs were available that claimant could perform within his restrictions. On May 24, July 19 and October 24, 2001, respondent sent claimant letters concerning his work status and requesting that he bid on certain jobs. Claimant declined the offer to return to maintenance and did not bid any other job. In the letter of October 24, 2001, claimant was advised that if respondent did not hear back from claimant by October 31 it would be assumed that claimant was resigning. Claimant contends he did not receive the letter until after October 31, 2001. However, claimant acknowledged that this did not matter because he believed the jobs described were not within his restrictions.

Claimant was examined at his attorney's request by board certified orthopedic surgeon, Edward G. Prostic, M.D. Dr. Prostic saw claimant on three occasions, June 27, 1994, March 23, 1999, and June 18, 2001. Dr. Prostic found claimant had a 7.5 percent

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[4] R.H. Trans. at 33.

impairment as a result of his 1979 injuries, and an additional 11 percent for a total 18.5 percent impairment as a result of the 1993 back injury. Following the January 2, 1998 injury claimant's impairment increased by an additional 9.5 percent. Dr. Prostic rated the knee impairment as 15 percent to the leg or six percent to the body as a whole. And he gave claimant an additional five percent for the aggravation to the back after claimant returned to work following his June 9, 2000 knee injury. Dr. Prostic said that these ratings were pursuant to the 4th edition of the AMA Guides.[5] When this additional five percent is combined with the six percent whole body impairment from the knee, it results in an additional 11 percent impairment to the body as a whole that is attributable to the June 9, 2000 accident. In Dr. Prostic's opinion, the additional five percent impairment to the back was a natural consequence of the leg injury. He recommended restrictions of no lifting more than 25 pounds occasionally, 10 pounds frequently, or 5 pounds constantly. Claimant should avoid more than occasional bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment, or captive positioning. Out of the 12 total job tasks identified on the list prepared by Mr. Dreiling, Dr. Prostic said claimant could no longer perform nine, a 75 percent task loss.

Board certified orthopedic surgeon C. Daniel Smith, M.D., first saw claimant on August 18, 2000. At that time claimant's complaints were of a painful right knee. Dr. Smith performed knee surgery on September 7, 2000. He saw claimant again on September 15, 2000 and removed the sutures. At that time, he also released claimant to return to regular duty work on the following Monday, which was September 18, 2000. Accordingly, the ALJ's Award of .43 weeks of temporary total disability compensation for the three day period of September 14 through the 17 was proper. When Dr. Smith last saw claimant on January 29, 2001, claimant described having achiness in his knee and a popping and cracking sensation. Dr. Smith found no swelling and a full range of motion in the knee. He determined claimant to be at maximum medical improvement and rated his impairment at five percent to the leg based upon the 4th ed. of the AMA Guides. [6] He did not place any permanent restrictions on claimant's activity.

David J. Clymer, M.D. is likewise a board certified orthopedic surgeon. He saw claimant on May 4, 1998 for back and leg complaints. He felt claimant had recurrent disk herniation at L4-5 and recommended surgical laminectomy and diskectomy. Claimant wanted to avoid surgery and therefore non-surgical options were discussed including epidural steroid injections, medical management and modified activity with work restrictions. A period of conservative treatment was attempted, but eventually Dr. Clymer performed the laminectomy on May 28, 1998. Claimant obtained some, but not complete

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment,* (4th ed.).

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment,* (4th ed.).

relief from the surgery. He attributed an additional seven percent functional impairment to the body as a whole to the January 1998 accident.

On April 18, 2001, claimant returned to Dr. Clymer with both chronic and progressive back and leg discomfort. New MRI studies of the lumbar spine showed multi-leveled degenerative disk changes, particularly at L4-5 and L5-S1 levels and scarring. Dr. Clymer attributed these findings to post-operative fibroysis and generalized persistent disk bulging, but not a new disk herniation. He attributed claimant's symptoms to a natural progression of the disease and aging. He did not see any relationship between the knee injury and the back discomfort. Dr. Clymer did find an increased impairment from the prior rating he had given for the January 1998 accident. He found claimant to have a 15 to 18 percent total impairment to the body as whole in January 1999 and would presently rate him at between 20 and 24 percent. But Dr. Clymer could not relate the increased impairment to claimant's job duties. Nevertheless, Dr. Clymer recommended restrictions of avoiding highly repetitive lifting, and suggested lifting limits in the range of 40 to 50 pounds. [7] He would find that claimant had lost the ability to perform eight of 12 tasks or 67 percent, if "frequent" meant more than 50 percent of the time or represented a significant portion of claimant's work. Further, Dr. Clymer acknowledged that his January 5, 1999 letter stated that claimant said his job did not require lifting more than 50 pounds and that he was able to manage that without any problems. [8]

Vocational rehabilitation counselor Michael Dreiling testified concerning claimant's job tasks and the terminology in the task list he prepared. Mr. Dreiling gave this definition of occasional and frequent:

> Q. (Mr. Crowley) When you say one-third of the time when using the word occasional, is that one-third of the time it took to do the task or one-third of an eight-hour day?
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> A. (Mr. Dreiling) Typically it's one-third of a typical day in this type of a work setting where he primarily worked in the same place over the 15 years, so this would basically be during an eight-hour workday that he would be involved with this particular task.
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> Q. So if we turn, say, to Task Number 5 and you have under the physical demands bending and stooping frequent, frequent would be one-third to two-thirds of an eight-hour day for performing a variety of repairs on elevator legs?

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[7] Clymer Depo. at 18.

[8] Clymer Depo. Ex. 3.

A. Correct.

Q. And is that the same with the remaining portion of the job tasks listed 1 through 12 in Claimant's Exhibit #3?

A. Correct. Those are based on an average eight-hour work day that he would be involved performing this particular task.

Q. If he was not required or did not have to spend eight hours of a day performing this task, how do you rectify using this definition of occasional and frequent as you list on the page with the physical demands of the particular job task?

A. I can't. Pretty much all of these tasks are based upon the assumption that for the most part when performed on average they would take up most of the day when he would be involved in that part of the repair. So there's no way to factor out if he only did this task for like two hours a day and then he moved over to another task for two hours. It's all based upon full-time duty. [9]

Pursuant to the collective bargaining agreement, after an employee has been off work for one year that individual will no longer be considered an employee and will be terminated. After the unsuccessful return to work in May 2001, claimant was sent letters dated May 24, 2001 and July 19, 2001, [10] explaining what jobs were available . Claimant was given yet another opportunity to accept an open position when respondent sent claimant a letter dated October 24, 2001. [11] That letter gave claimant until October 31 to contact Debbie Robinson, respondent's human relations director or be terminated. The letter of October 24 was sent certified mail, return receipt requested. After not hearing from claimant, a letter was sent dated November 26, 2001, [12] informing him that his employment was terminated.

K.S.A. 1999 Supp. 44-510e(a) prohibits work disability compensation if a claimant is earning 90 percent or more of his or her average gross weekly wage computed as of the

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[9] Dreiling Depo. at 12 and 13.

[10] Robinson Depo. Ex. 1.

[11] Robinson Depo. Ex. 2.

[12] Robinson Depo. Ex. 3

date of accident. The Kansas appellate courts, beginning with *Foulk v. Colonial Terrace*,[13] have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so. [14]

Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment. [15] Respondent has a valid defense against liability for work disability benefits because the record establishes that claimant's wage loss resulted from his refusal to accept respondent's offers and attempt to return to his former maintenance job within the restrictions recommended by Dr. Clymer. Furthermore, claimant refused to bid the other jobs with respondent that would most likely have paid at least 90 percent of his pre-injury average weekly wage.

Claimant's loss of an accommodated job paying 90 percent or more of his average weekly wage resulted from claimant's knowing and wilful failure to return to work for respondent. Had he done so, claimant likely would have been accommodated such that he could have performed the work within his restrictions and would be earning a comparable wage. The Board, therefore, will impute the wage claimant would have earned had he returned to work with respondent and not been terminated. As this would have been at least 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to compensation calculated by using his percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of July 9, 2002 entered by Administrative Law Judge Bryce D. Benedict in Docket No. 233,888 should be, and is hereby affirmed, but Docket No. 265,229 is modified to award claimant an additional five percent permanent partial disability for the increased

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[13] 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[14] *See Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

[15] *See Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

impairment to his back, for a total permanent partial general disability of nine percent. [16]

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Richard A. Baker, and against the respondent, Goodyear Tire & Rubber Company, for an accidental injury which occurred June 9, 2000 for a nine percent permanent partial general body disability based upon a weekly compensation rate of $383. The claimant is entitled to .43 weeks of temporary total disability compensation at the rate of $383 per week or $164.69 followed by 37.35 weeks at $383 per week or $14,305.05 for a nine percent permanent partial general body disability making a total award of $14,469.74. As of July 14, 2003 there would be due and owing to the claimant .43 weeks of temporary total disability compensation at $383 per week in the sum of $164.69 plus 37.35 weeks of permanent partial disability compensation at $383 per week in the sum of $14,305.05 for a total due and owing of $14,469.74 which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____day of July 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary L. Jordan, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[16] The ten percent impairment to the leg computes to a four percent impairment to the body as a whole. Using the Combined Values Chart in the AMA Guides (4th ed.) the four percent and five percent ratings combine to nine percent.